

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KEITH W. CANDLER,)	No. C 05-4108 MMC (PR)
)	
Plaintiff,)	ORDER OF PARTIAL DISMISSAL
)	AND OF SERVICE; DIRECTING
v.)	DEFENDANTS TO FILE
)	DISPOSITIVE MOTION OR NOTICE
M.S. EVANS, Warden, et al.,)	REGARDING SUCH MOTION
)	
Defendants.)	
_____)	

On October 12, 2005, plaintiff, a California prisoner proceeding pro se, filed the above-titled civil rights action under 42 U.S.C. § 1983 against Warden M.S. Evans (“Evans”), Captain J.W. Lewis (“Lewis”), Sergeant B. O’Kane (“O’Kane”), Lieutenant J. Hughes (“Hughes”), Correctional Officer W. Wilson (“Wilson”), Correctional Officer J.J. McAnelly (“McAnelly”), Nurse M. Aaya (“Aaya”), and Nurse Zingler (“Zingler”), all officials or employees of Salinas Valley State Prison (“SVSP”). On March 31, 2006, the Court found the complaint, when liberally construed, stated, against defendants Lewis, O’Kane, Hughes, Wilson, Aaya and Zingler, a cognizable claim for deliberate indifference to plaintiff’s safety and medical needs, as well as a cognizable claim for denial of access to the courts against defendant McAnelly. A third claim, against defendant Evans for allegedly failing to protect plaintiff from myriad other harmful actions by SVSP officials, was dismissed with leave to amend within thirty days. Plaintiff was cautioned as follows:

If plaintiff fails to timely file an amended complaint in conformity with this order, the third claim for relief, described above, will be dismissed with prejudice, and this action will only proceed based on plaintiff’s other two claims.

(Order of Dismissal with Leave to Amend, filed March 31, 2006, at 5 (emphasis in original).)

Plaintiff has not filed an amended complaint. Accordingly, the Court hereby orders as

1 follows:

2 1. The third claim for relief against Warden M.S. Evans, as described in the
3 March 31, 2006 Order of Dismissal With Leave to Amend, is DISMISSED.

4 2. The Clerk of the Court shall issue summons and the United States Marshal
5 shall serve, without prepayment of fees, a copy of the complaint with all attachments thereto,
6 a copy of the March 31, 2006 Order of Dismissal With Leave to Amend, and a copy of this
7 order upon the following defendants at Salinas Valley State Prison: **Captain J.W. Lewis,**
8 **Sergeant B. O’Kane, Lieutenant J. Hughes, Correctional Officer W. Wilson,**
9 **Correctional Officer J.J. McAnelly, Nurse M. Aaya, and Nurse Zingler.** Additionally,
10 the Clerk shall mail a courtesy copy a copy of the complaint with all attachments thereto, a
11 copy of the March 31, 2006 Order of Dismissal With Leave to Amend, and a copy of this
12 order to the California Attorney General’s Office.

13 3. No later than **ninety (90) days** from the date of this order, defendants shall file
14 a motion for summary judgment or other dispositive motion with respect to the claims in the
15 complaint found to be cognizable above.

16 a. If defendants elect to file a motion to dismiss on the ground plaintiff
17 failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),
18 defendants **shall** do so in an unenumerated Rule 12(b) motion pursuant to Wyatt v. Terhune,
19 315 F.3d 1108, 1119-20 (9th Cir. 2003).

20 b. Any motion for summary judgment shall be supported by adequate
21 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
22 Civil Procedure. **Defendants are advised that summary judgment cannot be granted,**
23 **nor qualified immunity found, if material facts are in dispute. If any defendant is of the**
24 **opinion that this case cannot be resolved by summary judgment, he shall so inform the**
25 **Court prior to the date the summary judgment motion is due.**

26 4. Plaintiff’s opposition to the dispositive motion shall be filed with the Court and
27 served on defendants no later than **thirty (30) days** from the date defendants’ motion is filed.
28

a. In the event the defendants file an unenumerated motion to dismiss under Rule 12(b), plaintiff is hereby cautioned as follows:¹

The defendants have made a motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, on the ground you have not exhausted your administrative remedies. The motion will, if granted, result in the dismissal of your case. When a party you are suing makes a motion to dismiss for failure to exhaust, and that motion is properly supported by declarations (or other sworn testimony) and/or documents, you may not simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or documents, that contradict the facts shown in the defendant's declarations and documents and show that you have in fact exhausted your claims. If you do not submit your own evidence in opposition, the motion to dismiss, if appropriate, may be granted and the case dismissed.

b. In the event defendants file a motion for summary judgment, the Ninth Circuit has held that the following notice should be given to plaintiffs:

The defendants have made a motion for summary judgment by which they seek to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact--that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendants' declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted in favor of defendants, your case will be dismissed and there will be no trial.

See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (holding party opposing summary judgment must come forward with evidence showing triable issues of material fact on every essential element of his claim). Plaintiff is cautioned that failure to file an opposition to defendants' motion for summary judgment may be deemed to be a consent by plaintiff to the granting of the motion, and granting of

¹The following notice is adapted from the summary judgment notice to be given to pro se prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir.
2 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

3 5. Defendants shall file a reply brief no later than **fifteen (15) days** after
4 plaintiff's opposition is filed.

5 6. The motion shall be deemed submitted as of the date the reply brief is due. No
6 hearing will be held on the motion unless the Court so orders at a later date.

7 7. All communications by the plaintiff with the Court must be served on
8 defendants, or defendants' counsel once counsel has been designated, by mailing a true copy
9 of the document to defendants or defendants' counsel.

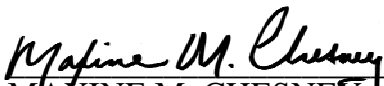
10 8. Discovery may be taken in accordance with the Federal Rules of Civil
11 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local
12 Rule 16-1 is required before the parties may conduct discovery.

13 9. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the
14 Court informed of any change of address and must comply with the court's orders in a timely
15 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
16 pursuant to Federal Rule of Civil Procedure 41(b).

17 10. Extensions of time are not favored, though reasonable extensions will be
18 granted. However, the party making the motion for an extension of time is not relieved from
19 his or her duty to comply with the deadlines set by the Court merely by having made a
20 motion for an extension of time. The party making the motion must still meet the deadlines
21 set by the Court until an order addressing the motion for an extension of time is received.
22 Any motion for an extension of time must be filed no later than the deadline sought to be
23 extended.

24 IT IS SO ORDERED.

25 DATED: December 11, 2006

26 
27 MAXINE M. CHESNEY
28 United States District Judge